

This Opinion is Not a
Precedent of the TTAB

Mailed: September 13, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re DRYPZ, LLC

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Serial No. 88711363

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Eric T. Johnson of Eric T. Johnson, PC,
for DRYPZ, LLC.

Ingrid C. Eulin, Trademark Examining Attorney, Law Office 111,
Chris Doninger, Managing Attorney.

—
Before Cataldo, Shaw and Lebow,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

DRYPZ, LLC (“Applicant”) seeks registration on the Principal Register of the
mark DRYPZ, in standard characters, for services identified as:

Therapeutic services, namely, intravenous hydration
therapy, intravenous electrolyte replacement therapy,
intravenous vitamin infusion therapy, intravenous
hangover alleviation therapy, intravenous amino acid
therapy, intravenous micronutrient therapy,
intramuscular vitamin therapy, lipotropic injection
therapy, oxygen therapy, wellness treatments in the

nature of therapeutic intravenous drip services and booster shots, in International Class 44.¹

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive of the identified services. When the refusal was made final, Applicant appealed. The case is fully briefed. We affirm the refusal to register.

I. Evidentiary matters

The Examining Attorney objects to internet web page evidence attached to Applicant's appeal brief on the ground that the evidence was not introduced prior to the appeal. The Examining Attorney's objection to the evidence is sustained. The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 CFR § 2.142(d). An exhibit attached to a brief that was not made of record during examination is untimely, and generally will not be considered. *Id. In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012). Accordingly, we do not consider the new material attached for the first time with Applicant's brief.

II. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of "a mark which, . . . when used on or in connection with the goods [or services] of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1). A

¹ Application Serial No. 88711363 was filed on December 2, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

term is “merely descriptive” within the meaning of Section 2(e)(1) “if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). A term “need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)).

“Descriptiveness must be evaluated ‘in relation to the particular goods or services for which registration is sought, the context in which the mark is used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use,’” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *Bayer*, 82 USPQ2d at 1831), and “not in the abstract or on the basis of guesswork.” *Fat Boys Water Sports*, 118 USPQ2d at 1513 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). “In other words, we evaluate whether someone who knows what the goods [or services] are will understand the mark to convey information about them.” *Id.* at 1515 (citing *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012)).

The mere misspelling of a word is not sufficient to change a merely descriptive term into an inherently distinctive trademark. *See Armstrong Paint & Varnish Works*

v. Nu-Enamel Corp., 305 U.S. 315 (1938) (NU-ENAMEL; NU found equivalent of “new”); *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; “There is no legally significant difference here between ‘quik’ and ‘quick’”); *In re Carlson*, 91 USPQ2d 1198, 1200-01 (TTAB 2009) (“[W]e find that HOUZING will be recognized as a misspelling of the descriptive word HOUSING.”); *In re Organik Tech. Inc.*, 41 USPQ2d 1690, 1694 (TTAB 1997) (“ORGANIK, which is the phonetic equivalent of the term ‘organic,’ is deceptive”); *In re Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987) (holding MINERAL-LYX generic for mineral licks for feeding livestock).

It is the Examining Attorney’s burden to show that a term is merely descriptive of an applicant’s goods or services. *Gyulay*, 3 USPQ2d at 1010. Once a prima facie case is established, the burden of rebuttal shifts to Applicant. *Id.*

The Examining Attorney argues that “the mark is merely descriptive because it immediately and directly conveys information about the services, namely, that they involve administering intravenous drips.”² That is, “consumers who know what applicant’s therapeutic services are, will understand that applicant’s applied-for DRYPZ mark conveys information about those services.”³

According to a medical-dictionary definition introduced by the Examining Attorney, “drip” is defined as “the slow, drop-by-drop infusion of a liquid”⁴ and “[a]

² Examining Attorney’s Br., 6 TTABVUE 5.

³ *Id.*

⁴ <https://medical-dictionary.thefreedictionary.com/drips>, September 24, 2020 Office Action, TSDR pp. 30-33.

fluid (e.g., packed red cells, volume expansion solution, resuscitation fluid) which is administered IV [intravenously] at a specified rate.”⁵

The Examining Attorney also introduced internet evidence to support the finding that “intravenous therapy, the relevant services here, are a form of therapy that delivers fluids directly into a vein”⁶ and are “commonly referred to as drips.”⁷ The following web page excerpts and online articles are most relevant:⁸

- Dripdoctors.com – the web site of the DripDoctors IV Vitamin Therapy & Regenerative Center, offering “IV VITAMIN DRIPS,” including an “IMMUNITY HIGH DOSE VITAMIN C INFUSION” and a “GLOW BEAUTY VITAMIN INFUSION.” The website includes the solicitation: “EAT, DRIP, RAGE, REPEAT.”
- Dripivtherapy.com – the web site of Drip IV Therapy, offering “vitamin infused blends to optimize repair, recovery, and rehydration on the cellular level.”
- Popsugar.com – featuring an article discussing the pros and cons of “IV drip therapy.”

⁵ *Id.*

⁶ Examining Attorney’s Br., 6 TTABVUE 6.

⁷ *Id.*

⁸ March 6, 2020 Office Action, TSDR pp. 2-9, 22-29; September 24, 2020 Office Action, TSDR pp. 2-29, 34-46.

- Theskinelite.com – the web site of the medical spa, The Skin Elite, offering “VITAMIN DRIP THERAPY.” The web site states, “Our drips include all of the necessary essentials to get you feeling great.”
- Driphydration.com – the web site of a company called Drip Hydration, featuring an article titled “How do IV Drips Work: Science & Methodology.” The article states, “Intravenous (IV) fluid drips deliver a combination of saline solution, vitamins, and electrolytes through a small catheter and tubing directly into the bloodstream.”
- Theivdoc.com – The web site of a company called THE I.V. DOC, which offers intravenous fluid treatments. The web site states, “[a]n I.V. drip usually takes just 30-45 minutes and its effects are felt almost immediately.”
- Ivnutritionnow.com – The web site of a company called IV Nutrition, offering “Full Intravenous Drips.” The web site states that the company’s “array of full IV bags give you a significant dose of vitamins to help with recovery, immunity, wellness, or anti-aging!” Sixteen different formulations are described, each with language explaining the ingredients such as “Hefty Hydration . . . This drip contains Calcium, Magnesium and Trace Minerals (Zinc, Copper, Manganese, Chromium and Selenium).”
- Medincinet.com – featuring a definition of “Drip” as: “Short for intravenous drip, a device for administering a fluid drop-by-drop into a vein via an intravenous (IV) route.”

- Health.harvard.edu – Featuring an article from the Harvard Health Blog titled “Drip Bar: Should you get an IV on demand?” The article discusses the pros and cons of “receiv[ing] IV fluids even when it’s not considered medically necessary or specifically recommended by a doctor.”
- Drypz.com – Applicant’s web site offering “IV THERAPY.” The web site includes a section answering frequently asked questions, including “How long are IV therapy drips?” and “How many sessions does it take until I see results from an IV drip?”

To rebut the Examining Attorney’s argument and evidence, Applicant introduced three third-party internet excerpts showing use of the term “Drips” in connection with other goods and services:⁹

- The Facebook page of a plumbing company called “Drips Plumbing.”
- Dripatlanta.com – the web page of a business called the Drip Coffee Shop.
- An Etsy.com web page called “Dripping in finesse” featuring jewelry and art for sale.

Applicant also introduced four third-party registrations for marks incorporating the term DRIP, used in connection with services similar to those of Applicant:¹⁰

- Registration No. 5956774 for the mark VITADRIP, in standard characters, for, inter alia, “Medical services in the field of intravenous therapy.”

⁹ Applicant’s September 4, 2020 Response to Office Action, TSDR pp. 7-10.

¹⁰ *Id.* at TSDR pp. 11-18. Registration Nos. 5956774 and 5945406 are commonly owned.

- Registration No. 5945406 for the mark VITADRIP and design, for, inter alia, “Health care services, namely, intravenous therapy.”
- Registration No. 5953565 for the mark OASISDRIP HYDRATION & WELLNESS SPA and design (HYDRATION & WELLNESS SPA disclaimed), for, inter alia, “Health care services, namely, injecting vitamin shots and intravenous drips.”
- Registration No. 6045895 for the mark GET A DRIP, in standard characters, for, inter alia, “Medical services, namely, administering intravenous vitamins; Therapeutic services, namely, intravenous vitamin infusion therapy.”

The Examining Attorney’s evidence establishes that the term DRIP is descriptive when used in connection with therapeutic intravenous (IV) fluid drips. The term DRIPS is simply the plural form of DRIP which is a fluid administered intravenously. The Examining Attorney’s evidence further establishes that a number of companies offer therapeutic “IV fluid drips,” “vitamin drips,” “IV drip therapy,” or “vitamin drip therapy” which are similar to Applicant’s “therapeutic intravenous drip services.” DRIPS thus merely conveys information to the prospective consumer that the offered therapeutic treatment is provided intravenously.

Applicant has modified the spelling of DRIPS to DRYPZ, with the letters “Y” and “Z” substituting for the letters “I” and “S” in DRIPS, but the modified term DRYPZ remains the phonetic equivalent of DRIPS. *See Carlson*, 91 USPQ2d at 1203 (holding “URBANHOUSING,” phonetic spelling of “urban” and “housing,” merely descriptive

of real estate services); *Hubbard Milling*, 6 USPQ2d at 1239 (holding MINERAL-LYX to be the phonetic equivalent of the generic term “mineral licks” for feeding livestock). We agree with the Examining Attorney’s contention that the mark’s “descriptive meaning or significance is not obviated by this purposeful or unconventional spelling.”¹¹ We therefore find the term DRYPZ to be merely descriptive when used in connection with Applicant’s intravenous therapeutic services.

Applicant argues that the applied-for mark is suggestive because DRYPZ “could involve several different products or services, such as plumbing, coffee shops, irrigations systems, and fashion.”¹² We disagree. Mere descriptiveness must be determined “in relation to the particular goods or services for which registration is sought[.]” *Chamber of Commerce*, 102 USPQ2d at 1219 (citation omitted). Thus, the fact that DRIPS may be used in connection with unrelated goods and services, such as plumbing services, coffee shops, or irrigations systems, is immaterial.

“Applicant acknowledges that third party marks are not conclusive” but, pointing to the four third-party DRIP-formative registrations it submitted, contends that “the long list of similar marks which have been accepted makes it perplexing why DRYPZ has been denied registration.”¹³

This argument is unpersuasive as well. The record includes only four third-party registrations submitted by Applicant; there is no “long list of similar marks which

¹¹ Examining Attorney’s Br., 6 TTABVUE 6.

¹² Applicant’s Br., p. 5, 4 TTABVUE 10.

¹³ *Id.* at pp. 6-7.

have been accepted” by the PTO. Further, the four particular registrations made of record by Applicant are distinguishable from the applied-for mark because they are comprised of compound or unitary marks that combine DRIP with registrable matter. If a compound word mark consists of an unregistrable component and a registrable component combined into a single word, no disclaimer of the unregistrable component of the compound word will be required. *See In re EBS Data Processing, Inc.*, 212 USPQ 964, 966 (TTAB 1981) (finding that “[a] disclaimer of a descriptive portion of a composite mark is unnecessary . . . if the elements are so merged together that they cannot be regarded as separable elements.”).

In any event, the fact that third-party registrations exist for marks allegedly similar to applicant’s mark is not conclusive on the issue of descriptiveness. *See In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977). An applied-for mark that is merely descriptive does not become registrable simply because other seemingly similar marks appear on the register. *Id.* It is well settled that each case must be decided on its own facts and the Trademark Trial and Appeal Board is not bound by prior decisions involving different records. *See Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

For the foregoing reasons, we conclude that when used in connection with Applicant’s intravenous therapeutic services, the proposed mark, DRYPZ, is merely descriptive of the services.

Decision: The refusal to register Applicant’s mark DRYPZ under Section 2(e)(1) of the Trademark Act is affirmed.